No. 83-1894

IN THE

Supreme Court of the United States

October Term, 1984

PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL-CIO, and ITS ROCKFORD AND BELOIT ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD
and
ROCKFORD-BELOIT PATTERN JOBBERS ASSOCIATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does section 7 of the National Labor Relations Act permit employees to make an enforceable agreement not to break a strike which they have begun pursuant to a democratic vote, before it has been ended by democratic procedures?

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INTEREST OF *AMICUS CURIAE*

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association comprised of 10,000 individuals, all of whom are members of the International Brotherhood of Teamsters. TDU's goal is to reform and democratize their union and, in so doing, to make it more responsive to the needs of its members. TDU members believe that a responsive union would be a more effective collective bargaining representative and would thus better serve their ultimate objectives of better working conditions.

TDU members have been actively involved in political affairs and in disputes within their union about the manner in which the union's bargaining power should be used. They have run for union local and international office, offered their views on proposed collective bargaining agreements, and sought legislation to better protect Teamster working conditions. TDU and its members have also played an active role as parties and *amicus curiae* in litigation designed to enforce federal statutes which protect union dissenters by guaranteeing them freedom to speak and to sue, *e.g., Helton v. NLRB,* 656 F.2d 883 (D.C. Cir. 1981); *Pawlak v. Greenawalt,* 628 F.2d 826 (3d Cir. 1980), fair elections, *e.g., Teamsters Local 82 v. Crowley,* 52 U.S.L.W. 4757 (1984), fair contract votes, *e.g., Bauman v. Presser,* 117 LRRM 2393 (D.D.C. 1984), and fair representation. *E.g., DelCostello v. Teamsters,* 51 U.S.L.W. 4693 (1983); *Hines v. Anchor Motor Freight,* 424 U.S. 554 (1976); *Early v. Eastern Transfer,* 699 F.2d 552 (1st Cir. 1982), *cert. denied,* 52 U.S.L.W. 3263 (1983).[1]

TDU also believes, however, that the concomitant of the right to participate in democratic decisionmaking about how a union should employ its collective bargaining power is the duty to accept the majority's decision and to stand by the decision until the majority votes to change it. Once a decision has been made by democratic means, it must be respected by the electorate which in turn produces a united front vis-a-vis the employer.

The Board's rule that a union cannot insist that members stand by their commitments is clothed in the language of individual rights. In fact, however, it demeans the individual right to engage in collective activity by undermining the effectiveness of that activity, and devalues the right to participate in the union's decisionmaking process by making union democracy a futile exercise. TDU submits this brief to be sure that the interest of individual union members in overturning the Board's rule is heard along with the unions' institutional interests, which are expressed in Petitioners' brief.

[1]Some of these cases involved PROD, which merged with TDU in 1979.

STATEMENT

This case arose in the aftermath of an unsuccessful strike conducted by two locals of the petitioner Pattern Makers' League against a multi-employer bargaining unit in Rockford, Illinois and Beloit, Wisconsin. After taking a strike vote by secret ballot as required by the union constitution, League Law 49(1), 43 members of the two locals commenced a strike for a new collective bargaining agreement on May 5, 1977. Pet. App. 30a. During the strike, all members accepted strike benefits from petitioners in amounts between $125 and $150 per week. *Id.* Nevertheless, on September 11, 1977, one of the union's striking members tendered his resignation and returned to work. Two weeks later, four more employees tendered resignations and returned to work; by December 2, the number of members who had purported to resign in order to cross the picket line had reached eleven, Pet. App. 27a-28a, all but one of whom was a member of the Beloit local. Pet. App. 11a. This breach of solidarity by such a large minority of the workforce prolonged the strike and compelled the locals to accept a contract embodying what they and their members believed to be inadequate wages and benefits. Pet. App. 31a.

One of the provisions in the union constitution, League Law 13, bars resignations during a strike or lockout, or

when a strike or lockout appears imminent, Pet. App. 28a; another provision prohibits members from working in a struck shop. League Law 49(3). Accordingly, after the strike ended petitioners notified the strikebreakers that their resignations had not been accepted, and assessed fines in an amount equivalent to the money that they had earned from the employers by crossing the picket line. Pet. App. 28a.

The National Labor Relations Board, agreeing with the recommendation of its Administrative Law Judge, ruled in a divided decision that the union could not enforce League Law 13 to prevent the resignations. And, because the strikebreakers were no longer members, the union could not impose fines on them. Pet. App. 13a. The Court of Appeals for the Seventh Circuit enforced the Board's order, ruling that the Act gives employees the right to avoid their collective commitments by simply changing their minds at any time. Pet. App. 8a.

SUMMARY OF ARGUMENT

The Board and the court below treated the issue in this case as a conflict between the section 7 rights of employees who seek to refrain from further participation in a strike, and the institutional interests of a labor organization which seeks to harness them to a failing collective enterprise. TDU believes that this analytic framework is fundamentally misconceived. To the contrary, this case presents the question whether employees' section 7 right to join together for mutual aid and protection allows them to make an agreement which binds all members so that the cohesiveness of the group is not destroyed.

The two quintessential rights under section 7 are the right to join a union and the right to strike. Without these

rights, employees cannot participate effectively in the system of collective bargaining which the NLRA is designed to foster. Yet during the economic conflict between employees and employers, there is great pressure on each individual employee to abandon the concerted activity which he has undertaken and return to work. Unless each employee knows, before the strike begins, that the strikers will be able to maintain their cohesion against these individualized pressures, no employee will have an incentive to initiate the collective activity. And unless the employer knows that the group can hold together, it will have no incentive to bargain with the union as an equal economic force.

Seen in this light, a union rule which limits its members' desire to return to work, even if the member "resigns" in order to do so, is not a limitation on section 7 rights but rather the product of the exercise of the section 7 right to band together with other employees for the purpose of collective bargaining. And by invalidating such union rules, the Board is cramping the effectiveness of what Congress intended and this Court has recognized as the only weapon in labor's arsenal for collective bargaining with employers. Even more important, it denies to each employee the section 7 right to voluntarily enter into a enforceable collective commitment to stand together for the duration of the strike.

ARGUMENT

The National Labor Relations Board and the Court of Appeals characterized this case as a conflict between the section 7 rights of dissenting employees who face economic hardships during a strike and the institutional interests of unions which seek to win the strike. The unions, for their part, argue for their right to be free from undue

government control of their regulation of the conduct of their members. Although recognizing the force of the unions' arguments based on the legislative history of the NLRA, TDU believes that both parties miss the mark by assuming that section 7 rights and institutional interests are necessarily in collision. In TDU's view, the Board's decision does not protect the section 7 rights of the dissenting employees; rather, it restricts the section 7 rights not only of the majority but even of the dissenters themselves. To understand why that is so, and why the Act forbids enforcement of the Board's order, it is necessary to examine the role of section 7 rights, and their exercise in the form of a strike as part of the system of labor relations which Congress has sought to foster by passing the National Labor Relations Act.

The NLRA is founded on the Congressional recognition that, in most instances, the individual employee lacks sufficient bargaining power to achieve a fair agreement with his or her employer over the terms and conditions of employment. Rather than supplant the free market entirely by creating a system of detailed government regulation of the terms and conditions of employment, Congress chose to give employees the opportunity to join together for the purpose of free bargaining with their employers.

Indeed, recognizing that the inevitable result of individual bargaining under conditions of inequality was to foster feelings of unfairness and inevitable conflicts which would disrupt interstate commerce and thus harm the public interest, Congress chose not simply to provide the opportunity, but indeed to "encourag[e] the practice and procedure of collective bargaining and . . . protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms

and conditions of their employment . . .." NLRA § 1, 29 U.S.C. § 151. Thus, Congress provided employees with the rights "to self-organization, to form, join or assist labor organizations . . . and to refrain from any or all of such activities . . .," § 7, 29 U.S.C. § 157, "as an instrument of [that] national labor policy." *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 735 (1981).

Congress did not, of course, require employees to participate in the regime of collective bargaining. Instead, employees in any unit appropriate for bargaining were given the power to choose by majority rule, under the strict supervision of an impartial government agency, whether to bargain individually or collectively. § 9, 29 U.S.C. § 159. Once the majority decision is made to exercise the option to bargain collectively, Congress required employers to bargain with the employees through their chosen representatives and to attempt in good faith to reach an accommodation of the interests of both sides in the form of a written collective bargaining agreement.

Section 7 rights are thus intended to enable employees to freely choose whether to engage in collective bargaining. But the role of section 7 does not end once a bargaining representative has been chosen, because it is still needed to ensure that the bargaining itself proceeds effectively. After all, so long as the employer fulfills its obligation to bargain in good faith, it need not agree to any proposal advanced by the union, nor make a concession on any term. *H.K. Porter Co. v. NLRB,* 397 U.S. 99 (1970). Thus, the terms of employment set by the employer remain in effect and govern the employees' working conditions until the employees, acting through their bargaining representative, can persuade the employer to agree to a change. Indeed, once collective bargaining has run its

course and the employer has bargained in good faith until an "impasse" is reached, it has the right to alter working conditions and even lower wages unless the union can persuade it not to do so.

Despite the best efforts of both sides to reach an agreement, it is inevitable that from time to time they may be unable to find a compromise with which each is satisfied. But as long as the employees continue to work, the employer's profits are unaffected, and it therefore lacks an incentive to break the logjam by accepting changes which it believes to be contrary to its economic interest. Thus, it is only by exercising their section 7 right to concertedly withhold their labor from the employer, or by threatening to do so, that employees can hope to pressure a reluctant employer to change its position:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors — the necessity for good faith bargaining between the parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms — exist side by side.
>
> *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960).

The central role of the strike in effectuating the policy of collective bargaining is therefore apparent: "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms . . .." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). Because the strike, or the threat of a strike, is the workers' *only* means of pressuring employers, it is the essence of the concerted activities protected by section 7. In fact, Congress considered the right to strike to be so important that section 13 states that nothing in the Act may diminish it in any way, "except as specifically provided herein." 29 U.S.C. § 163.

Like the decision to bargain collectively, the decision to strike must be respected by the minority until democratically revoked.[2] The importance of maintaining employees' solidarity during a strike is obvious. If the strike is to equalize their bargaining power with the employer and thus to serve the employees' objective of inducing the employer to change its position, it must be as effective as possible. This means that the employees must be able to maintain pressure on the employer by denying it access to its experienced labor pool, thus affecting its productivity and profits.

The employer, for its part, is unlikely to take this challenge to its perceived interests lying down; it will seek to operate during the strike, thus leaving the employees without income while it maintains production, and thereby putting pressure on the employees to agree to its

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[2]By the same token, if the employees decide by majority rule to accept the employer's terms, the minority are bound by that decision and cannot conduct a "wildcat" strike in order to press their own views of what settlement would be desirable. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939). *See also Emporium Capwell Co. v. Western Add'n Community Org.*, 420 U.S. 50 (1975).

demands. When an employer tries to maintain operations during the strike, the NLRA has been held not to preclude it from taking reasonable steps to protect its interests. Thus, for example, it may hire permanent replacements for striking employees, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938), and may subcontract work for the duration of the strike. *Hawaii Meat Co. v. NLRB*, 321 F.2d 397 (9th Cir. 1973); *Empire Terminal Warehouse Co.*, 151 NLRB 1359 (1965). It may even anticipate a threatened strike by choosing its own time for the initiation of economic warfare, by locking out the employees who have been unwilling to agree to the employer's offered terms. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965).

The employees' decision to exercise their statutory right to collectively reject the employer's terms and to strike is thus not without risks and is not undertaken lightly. Before employees strike, they will want some assurance that they will be able to finish what they start, which means, in practical terms, that they will have the collective stamina to withstand the severe economic pressures which the employer is lawfully permitted to bring to bear. They must recognize that each of them and their families may be faced with economic hardship, and that it may well become tempting for individual strikers to betray the collective trust by succumbing to the employer's demands and going back to work while their fellow employees continue to strike. If an individual could continue to earn income during the strike, and then reap the benefits of the collective pressure his colleagues on the picket line brought about, he would have the best of both worlds. In addition, he would retain his job if the strikers were permanently replaced and thus lost jobs in which they may have many years of seniority. In this manner, just as it happened during the strike from which this case arose, strikebreaking by

a single member can easily lead to a snowball effect in which an increasing number of individuals flout the majority decision to go on strike. *Supra* at p. 3. *See Machinists Local 1327 v. NLRB*, 725 F.2d 1212, 1217 (9th Cir. 1984).

If the employees knew in advance that individual workers could gain a free ride by going back to work, the likelihood of successful collective action by employees would be significantly diminished, if not eliminated entirely. Thus, each individual must be assured that the collective decision will be honored and that some of their fellow members will not try to walk away from the decision to strike, except as part of a collective decision to compromise with the employer. By adopting the union rules at issue in this case, pursuant to which each striker who returns to work before the majority has voted to do so is fined for that conduct, the unions have adopted the only sensible response to the dilemma of this free rider problem.

This is not the only context in which a free rider problem arises in collective bargaining. The continuing responsibilities of bargaining for contracts, policing the contract, hearing grievances, establishing a system for the adjudication of disagreements between employees and employer about the meaning of the contract, analyzing employer proposals, and the like, require the creation of organizations which can hire a staff, open offices, and support the membership during strikes. All of this takes money, and Congress has recognized the profound unfairness of requiring the employees to bargain collectively for and to represent fairly all members of the bargaining unit, without requiring all the beneficiaries to bear the costs which that entails. Accordingly, every member of the bargaining unit may be required to "support the union," but only to the extent of paying reasonable initiation fees

and union dues, if the employees and employer so agree in collective bargaining. NLRA §§ 8(a)(3) and 8(b)(5), 29 U.S.C. §§ 158(a)(3) and 158(b)(5). But it remains a wholly voluntary decision by each employee whether to take the further step of joining the association of employees (*i.e.*, their union), as the resigning members did here before the strike, and thus to assume the various rights and responsibilities which membership entails. *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

Congress has also imposed various responsibilities on employee organizations in order to protect the voluntary character of the decision whether or not to assume full membership. The union has a duty to fairly represent all members of the bargaining unit, not just members of the union. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). It cannot bargain for higher wages for members than for nonmembers. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 47 (1954). It cannot refuse to process grievances for nonmembers, *Abilene Sheet Metal Co. v. NLRB*, 619 F.2d 332, 347 (5th Cir. 1980), nor refuse to refer them for work. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961). The union cannot discriminate against nonmembers by seeking their discharge for any reason except nonpayment of dues, and employers for their part are also forbidden to discriminate against nonmembers. *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41-42 (1954). Most important for purposes of this case, the union's rules cannot apply to nonmembers and they cannot be disciplined (*i.e.*, fined) for violating them. *NLRB v. Granite State Jt. Bd.*, 409 U.S. 213, 217 (1975).

By contrast, an employee who does make the voluntary choice to join the employees' collective organization acquires a set of rights and responsibilities which are defined in part by the democratic decision of the employees themselves, and in part by Congress' decision in enacting the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). Thus, members have the right to choose their officers, who will lead the employees in the collective bargaining process, 29 U.S.C. §§ 481-483, and to attempt to persuade the elected leadership, and each other, of the best course for the collective body to follow. 29 U.S.C. § 411(a)(2). They have the right to participate in the deliberations on union business, 29 U.S.C. § 411(a)(1), and the right to control the level of dues charged both to themselves and to any other employees who have chosen not to become full members of the union. 29 U.S.C. § 411(a)(3). And the law gives them the right to adopt and amend a constitution for the organization, 29 U.S.C. § 431(a), which sets forth the procedures by which union decisions will be made and the procedures by which violations of the collectively adopted rules will be punished. In exercising these LMRDA rights to influence union affairs, they are also exercising their rights under section 7 of the NLRA. *General Motors Corp. v. NLRB*, 512 F.2d 447 (6th Cir. 1975).

The decision to engage in a strike, like the decision to accept an employer's proposals and refrain from striking, is made by the members of the union pursuant to this federally protected democratic procedure. Despite the pressures which the members collectively face as a possible strike draws near, each member retains the right to speak out against the leadership and against the majority to try to persuade them either that greater or lesser militance is required in the particular circumstances. *See NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191 (1967). If a proposal is put forth by the union leaders, the members

have the right to debate it and to consider the best course of action before they vote, so that their decision will be an informed one. *Bauman v. Presser*, 117 LRRM 2393 (D.D.C. 1984).

It is the union's members who decide whether to take the very real risks of engaging in a strike against their employer, and who may call upon the collective for support in the form of payments from the union's strike fund. It seems only fair that those who have and exercise these rights should also be free to include in their decision to strike the personal commitment to stand together in the face of adversity, and thus to continue the strike together until a majority decision is made to abandon it. Indeed, it demeans the individual decision to join or not to join the employee organization for the Board to say that members of that organization cannot commit themselves to stand together in the hour when they need each other the most.

In rejecting another union's attempt to fine members who resigned their membership and then crossed the picket line, *NLRB v. Granite State Jt. Bd.*, 409 U.S. 213, 217 (1972), the Court gave "little weight" to the fact that the fined strikers had themselves participated in the passage of the resolution providing for fines for members who crossed the line. But the reason for disregarding that fact was that the resolution as passed applied only to members, implicitly leaving open the right to resign from the union and thus avoid its force. And the Act requires that, before a majority decision can be applied to waive the rights of individual employees under section 7, there must be a clear and unambiguous expression of intent to surrender the right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Thus, in *Granite State*, the Court properly insisted upon a strict reading of provisions said to work a waiver of the section 7 right to refrain from engaging in

concerted activity. *See also Machinists Booster Lodge 405 v. NLRB*, 412 U.S. 84, 89 (1973). Here, by contrast, the union rules clearly restricted the right to resign during a strike, and therefore were sufficient to waive that right.

The Board justifies its decision by saying that the employee "right" to refrain from concerted activities cannot be outweighed by the mere institutional "interest" of the union. *Machinists Local 1414 (Neufeld Porsche-Audi)*, 170 NLRB No. 209, 116 LRRM 1257, 1261 (1984). This statement is inconsistent with the well-established law that the rights protected by section 7 must be weighed against the *employer's* institutional interests in operating its business.[3]

But even more important, the Board's analytic framework, which treats this case as a conflict between individual rights and institutional interests, is fundamentally unsound. What the Board overlooks is that the formation of a union and the adoption of its constitution and bylaws

[3]Thus the employer is permitted to use the various tactics discussed *supra* at 10, which are intended to discourage the exercise of the right to strike. The employer may forbid union solicitation and literature distribution in a variety of circumstances, *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), and may even seek to discourage self-organization by closing its business. *Textile Workers v. Darlington*, 380 U.S. 263 (1965). Indeed, unlike the institutional interests of employers, which have simply been presumed despite the absence of any statutory language recognizing them, *see* Atleson, *Values and Assumptions in American Labor Law* 1, 19-21 (1983), the right of unions to regulate their internal affairs, particularly the acquisition and retention of union membership, is expressly protected by the proviso to section 8(b)(1)(A). If employers' institutional interests are entitled to consideration and frequently outweigh section 7 rights, it is odd that the Board is unwilling to give the same deference to the institutional intersts of labor organizations.

generally, and in particular the rule against resignation for the purpose of crossing the picket-line during a strike, are themselves the expression of the employees' right to engage in concerted activities under section 7, *i.e.*, the rights of employees "to form, join or assist labor organizations" and "to engage in other concerted activities." By refusing to allow the enforcement of the rule, the Board denies not only the rights of the employee majority, but also the right of the very same dissenting employee who now seeks to return to work without penalty, to enter into a meaningful collective contract with other employees so that the rights guaranteed by section 7 are not empty promises.

In this sense, the section 7 right which the Board would deny is analogous to the freedom of contract; indeed, this Court has frequently noted that the rights and obligations imposed by a union constitution are contractual in nature. *E.g., NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973). It is not at all unusual for an individual who voluntarily enters a contract to decide at a later time that the contract was disadvantageous. But it is scarcely consistent with the freedom of contract to allow such an individual to escape his or her bargain for that reason alone. So long as the contract was freely entered – and it is the purpose of the Congressional scheme discussed above to ensure that no employee is coerced into assuming the obligation and that democratic procedures are followed both in adopting the constitutional rule and in deciding to strike – the freedom of contract, and the analogous section 7 right to join together to engage in collective activity, require the enforcement of that contract and not its abrogation.

To say that the dissenting members are stuck with their bargain, of course, is not to say that they are without any recourse to protect their interests when the decision to

strike appears to them, in retrospect, to have been erroneous. They may argue with their fellow members that enough is enough, and urge them to work together to bring the strike to an end. *Parker v. Steelworkers Local 1466*, 642 F.2d 104 (5th Cir. 1981). They may meet as a dissident caucus to plot a strategy for ending the strike. *Keubler v. Cleveland Lithographers*, 473 F.2d 359, 362-363 (6th Cir. 1973). They may initiate a campaign against the union leadership, or even seek to have the union decertified as their collective bargaining representative. *Machinists Lodge 702 v. Loudermilk*, 444 F.2d 719 (5th Cir. 1971).

And of course, although they are not free to cross the picket line, dissenting employees may seek to work for other employers and simply abandon their jobs with the struck employer. For although the issue is framed in terms of a right to resign, the real issue is whether a union can create an effective mechanism for enforcing its rule against strikebreaking by fining members who purport to resign their membership in order to evade their obligations under that rule. If the employees resign without crossing the picket line, the reason for the discipline disappears. *See* Note, *Union Power to Discipline Members Who Resign*, 86 Harv. L. Rev. 1536, 1549 *et seq.* (1973).

Thus, union members who decide that the strike is no longer a worthwhile endeavor have numerous ways to protect their individual and collective interests. What they may not do is break their contract with their fellow members to join collectively in withholding their labor from the employer by returning to work before the majority decides to do so.

CONCLUSION

For these reasons, as well as those stated in petitioners' brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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